BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEITH E. WOODS Claimant VS. **TOLLE FURNITURE GROUP** Respondent AND **CONTINENTAL WESTERN INS. CO.** Insurance Carrier	)	Docket No. 1,022,984

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 12, 2011, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. James M. McVay, of Great Bend, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) designated Dr. Pat Do as the authorized treating physician for all treatment, including right shoulder surgery, tests and referrals, except referrals to rehabilitation hospitals, and further provided that any change to Dr. Do's authorization must be approved by the court.

ISSUES

Respondent requests review of whether claimant's current need for medical treatment to his right shoulder as ordered by the ALJ is a natural and probable consequence of his agreed work-related accident of December 7, 2004.

Claimant argues that the evidence shows that his request for medical care, specifically the shoulder surgery recommended by Dr. Do, is causally connected to his original injury and resulting surgeries on his right shoulder.

The issue for the Board's review is: Is claimant's current need for medical treatment to his right shoulder a natural and probable consequence of his work-related injury?

FINDINGS OF FACT

Claimant originally injured his right shoulder in a work-related accident on December 7, 2004. He underwent two surgeries to his right shoulder, an arthroscopic subacromial decompression and rotator cuff repair by Dr. Hearon in March 2005 and repeat surgery by Dr. Hearon in September 2005 for diagnostic shoulder arthroscopy and division of the middle and superior glenohumeral ligaments as well as repair subacromial decompression. On March 29, 2007, a running award was entered in which the parties stipulated that claimant had a 13.8 percent impairment of function to claimant's right shoulder as a result of his 2004 work-related accident. Future medical was left open to be received after proper application to and approval by the Division of Workers Compensation. This appeal is from an order after a preliminary hearing involving claimant's request for post award medical treatment.[1]

An Application for Post Award Medical was filed with the Division on June 26, 2009. As a result, the ALJ appointed Dr. Pat Do as a neutral physician to perform an evaluation on claimant. Dr. Do's independent medical examination (IME) report was filed with the Division on October 2, 2009, and recommended claimant have an MRI scan to look at the rotator cuff for residual impingement. In her post-award medical Award dated May 14, 2010, the ALJ authorized Dr. Do to be claimant's authorized treating physician. Claimant underwent a third surgery on his right shoulder, an arthroscopy with extensive debridement of the glenohumeral joint, subacromial decompression, and rotator cuff repair, which was performed by Dr. Do on May 24, 2010. Claimant was released by Dr. Do as being at maximum medical improvement on September 30, 2010. On that day, claimant's chief complaint was localized pain over his acromion clavicular (AC) joint in his right shoulder, the area where his collar bone meets the acromion. Dr. Do reviewed his records and verified this was a new complaint. Dr. Do testified claimant was not having pain in that area at the time he performed the IME in 2009.[2] Dr. Do gave claimant an injection in his AC joint on September 30, 2010.[3] He considered the injection to be part of claimant's workers compensation claim.

Dr. Do examined claimant on May 3, 2011. At that time, claimant was complaining of pain in his shoulder that moved into his neck. Dr. Do said almost all claimant's pain was over his AC joint, which was a pain that had been consistent since September 30, 2010.

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[1] In this case, the parties elected to utilize the procedure contained in K.S.A. 44-534a rather than K.S.A. 2010 Supp. 44-510k.

[2] Do Depo. (May 4, 2011) at 21.

[3] *Id*. at 31.

Dr. Do discussed with claimant a fourth surgery on claimant's shoulder. Dr. Do testified he would rather not perform another surgery on claimant's shoulder, but claimant told him his pain was such that he wanted the surgery. Dr. Do said he had already tried therapy and an injection, and if claimant wants surgery, he was willing to perform the surgery in an effort to reduce claimant's pain. In the surgery, he would remove a portion of claimant's distal clavicle to get less compression and less impact at the AC joint.[4]

Dr. Do testified that he was not completely sure that claimant's current AC pain was related to claimant's original work injury, but the injury and multiple surgeries likely aggravated some component of the AC joint.[5]

> Q. [by claimant's attorney] So I thought I heard you say that more probably than not the surgeries that–the original injury and then subsequent surgeries, more probably than not, aggravated or accelerated the condition in Mr. Woods' right shoulder such that he now needs or could use if he opts to use the surgery that you have described?
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> A. [by Dr. Do] Yes. And when you asked me if it was aggravated and accelerated. So yes, it can because you're losing the muscle stabilizers. So the static stabilizers around the AC joint have to take more stress.
>
> Q. And you don't know–
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> A. So if you asked me did it aggravate and accelerate? Yes.[6]

However, Dr. Do further testified:

> Q. [by respondent's attorney] . . . If he didn't have this complaint on a consistent basis during therapy, all the times that you saw him through July, 2010; August, 2010; September, isn't it more likely that the aging process is the primary factor in why he would then and now have this AC joint problem?
>
> . . . .
>
> A. Yes, sir.[7]

Dr. Do went on to explain that claimant's shoulder injury and subsequent surgeries would be expected to cause symptoms in the musculature around the shoulder and into the neck. And Dr. Do had previously reported claimant having such diffuse pain.

Claimant's attorney filed an Application for Preliminary Hearing on June 2, 2011, asking for authorization of the shoulder surgery by Dr. Do. Following a July 7, 2011,

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[4] *Id*. at 55.

[5] *Id*. at 52, 55-56.

[6] *Id.* at 58-59.

[7] *Id*. at 60-61.

hearing, the ALJ entered an order on July 12, 2011, again authorizing Dr. Do. to treat claimant.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In claimant's request for post-award medical treatment, he has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.[8] In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.[9]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[10] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[11] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's

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[8] K.S.A. 2010 Supp. 44-501(a).

[9] K.S.A. 2010 Supp. 44-510k(a). See *Siler v. Shawnee Mission School District, USD 512*, 45 Kan. App. 2d 586, 251 P.3d 92 (2011).

[10] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[11] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

> disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[12] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[13] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[14]

In *Logsdon*,[15] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
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> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

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[12] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[13] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[14] *Id.* at 728.

[15] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

Finally, in *Casco*,[16] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

ANALYSIS

Because the parties elected to proceed to a hearing before the ALJ utilizing the procedure under K.S.A. 44-534a instead of the preferred procedure for litigating post award medical provided in K.S.A. 2010 Supp. 44-510k, this appeal is not an appeal from a final order. Accordingly, the Board's jurisdiction is limited and this appeal will be heard and decided by a single Board Member as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A) as opposed to being determined by the entire Board as it is when the appeal is from a final order.[17]

The issue presented for the Board's review is whether claimant's current need for post award medical treatment is a natural and probable consequence of his work-related injury. Stated another way, the dispute is whether the current injury arose out of and in the course of claimant's employment with respondent. This is an issue which the statute provides shall be considered jurisdictional on an appeal from a preliminary hearing order.[18]

In the Stipulated Running Award entered March 29, 2007, by Judge Barnes, the parties agreed and the ALJ found that claimant met with personal injury by accident on December 7, 2004, that arose out of and in the course of his employment with respondent. Respondent paid $27,257.68 in authorized medical expenses and 35.38 weeks of temporary total disability, and claimant was awarded permanent partial disability compensation based upon a 13.8 percent scheduled injury to the right upper extremity at the level of the shoulder.[19] An exhibit to that agreed award was a September 11, 2006, report by Dr. Do. That report included a history of claimant's prior medical treatment for his work-related injury, which reads in part:

> He reports that the injury occurred on 12/07/04. At that time, he was helping to unload a sofa off the truck. The person helping him dropped his end of the sofa and that landed on the top of the right shoulder. He was referred to the chiropractor for treatment, which did not provide any relief. Eventually, he was referred to Dr.

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[16] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

[17] See K.S.A. 2010 Supp. 44-555c(k).

[18] K.S.A. 44-534a(a)(1).

[19] ALJ's Stipulated Running Award (Mar. 29, 2007) at 2.

> Hearon for treatment. Dr. Hearon treated him with injections, physical therapy, and MRI.
>
> Eventually, Dr. Hearon performed surgery on 03/02/2005. At that time, surgery consisted of arthroscopy of the right shoulder, arthroscopic subacromial decompression, and rotator cuff repair.
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> The patient continued having significant symptoms of pain with limited motion and eventually Dr. Hearon performed a second surgery. This was performed on September 19, 2005. This surgery included examination her [*sic*] under anesthesia, diagnostic arthroscopy of the right shoulder, intraarticular debridement including division at the middle glenohumeral joint ligament and superior glenohumeral joint ligament as well as a subacromial decompression with lysis of adhesions. The patient had quite a bit of physical therapy after the surgery, but continued having problems. He was released by Dr. Hearon in September 2005.
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> The patient was also seen by Dr. Poole who had recommended a third surgery, but with no guarantee that it would help. The patient declined this. The patient was also seen by Dr. Murati for an independent medical evaluation for rating and restrictions. This was done on 04/19/2006. Dr. Murati issued a 20% whole person impairment.[20]

At the time of Dr. Do's 2006 examination, claimant related his current status as:

> Today the chief complaint is right shoulder pain with decreased range of motion and weakness.
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> He reports difficulties with pain and describes it as a sharp pain. Any motion of the right arm makes the pain worse. Motrin seems to make it better.
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> On a scale from 0 (no pain) to 10 (excruciating pain), the examinee reports the pain is currently a 10/10. Over the past month, the pain averaged 10/10.
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> The patient also reports difficulties with activities such as putting on a shirt or taking a shower. He reports that he cannot lift anything with it.[21]

At the time of Dr. Do's September 24, 2009, examination, claimant's current status was described as:

> He is complaining of pretty severe pain most of the time he has a lot of painful mechanical symptoms in his shoulder. He rates his pain at today by questioning pretty severe most of the time and it is not something he wants to live with. He has to take Advil even to try to go to sleep. It hurts him to raise his arm up. His pain is very sharp.[22]

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[20] Stipulated Running Award (Mar. 29, 2007), Ex. A at 1-2.

[21] Stipulated Running Award (Mar. 29, 2007), Ex. A at 2.

[22] Dr. Do's IME report filed with Division on October 2, 2009, at 1.

Respondent attempts to describe claimant's current symptoms as being something new and different. However, claimant has had diffuse symptoms and pain that extended well beyond the shoulder joint for quite some time. Claimant attributes his current symptoms to his work-related accident and the injuries that resulted from that accident. Despite suggestions of an intervening injury in 2010, Dr. Do likewise attributes claimant's present complaints and the suggested surgery to claimant's original injury and the subsequent surgeries. Claimant has never been pain free since his original work-related injury. Dr. Do explained how a shoulder injury and shoulder surgeries can lead to problems extending beyond the shoulder. This Board Member finds claimant's current need for treatment is a direct and natural consequence of the original injury and the subsequent surgeries claimant has had for that work-related injury.

CONCLUSION

Claimant's current need for medical treatment is a direct and natural consequence of his original work-related injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 12, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
James M. McVay, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge